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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 696

THE FIRST NATIONAL BANK OF CHICAGO, etc., et al.,
Petitioners,

vs.

MARGARET DE KORWIN, etc.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

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May It Please The Court:

I.

There Is No Conflict Of Decisions Presented By The Record.

In their anxiety to present a case meriting the consideration of this Court on further review, petitioners have dis-

torted and misrepresented the record. There is in actuality no conflict between the ruling below and decisions of either other Federal or State courts.

Grossest misrepresentation by petitioners is in their claim that this proceeding was an action to contest the validity of a will. In stating the question presented, petitioners say (p. 9): "This suit attacks the validity of an Illinois resident's will". Again, at page 20, the petitioners say: "In a case such as this to contest a will . . .". At several other points petitioners attempt to create the impression this suit was brought to contest the will of Otto Young.

Their purpose is plain. The Illinois statute, creating a right to contest the validity of a will, requires joinder of all the decedent's heirs as a prerequisite to such relief (Ill. Rev. Stat., chap. 3, sec. 243). Therefore, if this were in fact the statutory action to contest a will, all heirs would have been indispensable parties. Also, the indispensability of parties in such a case is a matter of substance.

Even without reference to the record, the petitioners' distortion becomes absurd upon a moment's reflection. Petitioners point out that Otto Young's will was admitted to probate in 1906 (p. 3). The instant suit was brought in 1934, some thirty-eight years afterward, according to the petitioners (p. 6). Yet, the Illinois statute authorizing actions to contest wills provides that such proceedings must be commenced within nine months after admission of the instrument to probate (Ill. Rev. Stat., 1945, chap. 3, sec. 242). Moreover it has been held by this Court that the decree of a probate court cannot be set aside in federal equity court. (*Simmons* v. *Saul*, 138 U. S. 439; *Kieley* v. *McGlynn*, 88 U. S. 503; *Sutton* v. *English*, 246 U. S. 199.)

Recourse to the record, however, demonstrates conclusively that the instant proceeding was not an action to contest a will.

This Court recently reaffirmed the proposition that diversity jurisdiction "must be ascertained from the principal purpose of the suit, and the primary and controlling matter in dispute". (*Indianapolis* v. *Chase National Bank*, 314 U. S. 63, 69.) As the record shows, a construction of the will of Otto Young is the principal purpose of this suit and the primary and controlling matter in dispute.

While not controlling, still significant is the entitling of plaintiff's bill as "Complaint In Chancery To Construe Will, Etc." (R. 3). Furthermore, the main prayer for relief is as follows:

> "That the Court may declare and establish the true meaning of, and the proper construction to be placed upon, the last will and testament of Otto Young, deceased, particularly in respect of the specific provisions thereof set forth in the three counts of this complaint . . ."

In their answering brief in the reviewing court below, the petitioners explicitly admitted that the suit was primarily a proceeding for the construction of a will. There they said (p. 68):

> "It is obvious that the point of controversy between the parties hereto involves a construction of the will of Otto Young."

The Court of Appeals in its opinion found that this proceeding had as its principal purpose the construction of Otto Young's will. The Court said (R. 187):

> "True, the complaint does ask for a partition and division of the trust estate as part of the relief prayed for. This is but incidental, however, to the main pur-

> pose of the suit which is the constructon of the will of Otto Young. The prayer for the partition may properly be treated as surplusage."

This finding by the Circuit Court of Appeals is not challenged by petitioners. It may not, therefore, be urged in good faith here that the complaint under consideration was not basically a bill for the construction of a will.

In the case at bar, all beneficiaries of the testamentary trust are joined as parties defendant along with the trustee (R. 129-131). Only certain heirs who do not take under the will are omitted as defendants. The leading text writer on the subject states that heirs who are not beneficiaries of the testamentary trust need not be joined as parties.

In Thompson on Construction of Wills, the author says (sec. 620, p. 796):

> "A bill praying for the construction of a will is a bill primarily for construction, even though it contains a prayer to remove a cloud from the title, and the prayer to remove the cloud will be treated as surplusage."

This leading textwriter goes on to point out (sec. 619, pp. 793-794):

> "As a general rule in a proceeding to construe a will, all the parties named in the will as legatees or devisees are necessary parties . . . Heirs of the testator expressly excluded from taking under the will are not proper or necessary parties."

In attempting to make a case for certiorari, the petitioners have seized upon a passing observation of the Court below, removed it from its context, and set it out as the decision which conflicts with the other courts, Federal and State. Such is the strain under which petitioners have labored in seeking to procure issuance of the writ.

The comment into which petitioners have read the violent conflicts appearing in their petition is (R. 185):

> "We think the rule as to the indispensability of parties must be determined by Federal rather than local rules."

In making their point as to the presence of a conflict, petitioners cite two opinions by the Eighth Circuit Court of Appeals where it was said that the indispensability of parties would be controlled by the State statute (*Young* v. *Garrett*, 14 F. 2d 223; *Thomson* v. *Butler*, 136 F. 2d. 644).

It is to be noted that both of the cited cases were actions at law. The *Young* case was an action in ejectment; the *Thomson* case was a statutory proceeding to contest the validity of a will. It was specifically held in each opinion that the Conformity Act was controlling.

The postured conflict is shown to be more apparent than real by another decision of the same Court of Appeals. In *First Trust & Savings Bank* v. *Iowa-Wisconsin Bridge Co.*, 98 F. 2d 416, 420, the Eighth Circuit Court of Appeals held that as to the indispensability of parties, State law controls substantive rights and as to remedial or procedural rights the Federal rules govern. In this connection the Court said (p. 420):

> "The Conformity Act of 1872, 88 U.S.C.A., sec. 724, by its terms is not applicable to equity causes."

It becomes obvious, then, that the petitioners have given no thought to the differentiation between suits in equity, such as the case at bar, and actions at law, such as the *Young* and *Thomson* cases relied on for the conflict. Likewise, it is clear the petitioners have made no distinction between the substantive and remedial aspects of the general question as to the indispensability of parties.

It would seem plain that where a joinder of certain persons is a requisite to the right of action itself, the indispensability of such parties is a matter of substance and would be governed by State law. On the other hand, where the joinder of persons is not a part of the right of action but the question is largely a matter of convenience or policy, such as whether the court can do justice to the parties before it without injuring any absent persons, the problem is procedural or a question of remedy and is controlled by Federal rules.

This Court, itself, has said (*Niles-Bement Co.* v. *Iron Moulders Union*, 254 U. S. 77, 80):

> "There is no prescribed formula for determining in every case whether a person or corporation is an indispensable party or not."

In *Seeley* v. *Cornell*, 74 F. 2d 353, which was a proceeding greatly resembling the case at bar, the Court held that coheirs were not indispensable parties. This Court denied certiorari (295 U. S. 742). The Court of Appeals in deciding the *Seeley* case said (p. 355):

> "The rule as to who are considered indispensable parties in a suit in equity in federal courts has been repeatedly announced by the Supreme Court.. In substance it is: where the interests of the parties before the court are separable from those of the parties omitted, and the court can do justice between the parties before it, without prejudice to the rights of the absentees, jurisdiction will be maintained." (Citing *Horn* v. *Lockhart*, 17 Wall. 570; *Payne* v. *Hook*, 7 Wall. 425; *Waterman* v. *Canal-Louisiana Bank Co.*, 215 U. S. 33.)

This position was adopted in the case at bar by the Court below. The Court of Appeals founded its decision on the same decisions by this Court: *Horn* v. *Lockhart*, *Payne* v. *Hook*, and *Waterman* v. *Canal-Louisiana Bank Co.*

Assuming arguendo, that there were substance to the petitioners' claim of conflict and that the State law controlled the indispensability of parties in the case at bar, the same result would obtain upon this record. The Illinois Supreme Court held in *Pennsylvania Co.* v. *Bauerle*, 143 Ill. 459, 462:

> "The heirs of the testator are not necessary parties to a bill filed for the construction of a will as to the residuary estate, when, after special bequests, all the residue of the estate is given to certain devisees, but the latter are necessary parties."

Petitioners in presenting their case have lost sight of the fact that indispensability to the diversity of citizenship jurisdiction is peculiar to the Federal courts and could not be controlled by State law (*Equitable Trust Co.* v. *Denney*, 24 F. 2d. 169, 170; *Bogard* v. *Southern Pac. Co.*, 228 U. S. 137).

Moreover, petitioners have not borne in mind that no allegations have been made against the omitted heirs, nor is any relief sought from them. In *Payne* v. *Hook*, 74 U. S. 425, the Court said (p. 432):

> "It can never be indispensable to make defendants of those against whom nothing is alleged and from whom no relief is asked."

In short, petitioners' position here is not in agreement with the fundamental view of this Court on the subject, as announced by Mr. Justice Sutherland in *Bourdieu* v. *Pacific Oil Co.*, 299 U. S. 65, 70:

> "The rule is that if the merits of the cause may be determined without prejudice to the rights of necessary parties, absent and beyond the jurisdiction of the Court, it will be done; and a court of equity will strain hard to reach that result."

II.

The Decision Below Is Sustainable On Other Grounds Than The Reasons Of The Opinion.

Unnoticed by the petitioners are two other grounds sustaining the judgment of reversal by the Court of Appeals. These grounds were urged in the briefs below, and noticed in the opinion (R. 187):

> "Our rulings upon the issues discussed make it unnecessary to consider other questions raised by the parties in their briefs."

Upon this record it is admitted by the petitioners that the complaint states a good class suit, and a Federal question is presented, each which would sustain the jurisdiction regardless of diversity of citizenship. We merely mention this phase of the record to suggest the truly frivolous character of the petition.

Conclusion.

The individual citizenship of each defendant was not specifically alleged in the original complaint (R. 4). Instead, the allegation as to citizenship was laid generally (R. 4):

> "The individual defendants are citizens of the States of California, Florida, Illinois, Maryland, Michigan, New Jersey, and Pennsylvania."

This averment was technically defective under *Robertson* v. *Pease*, 97 U. S. 646, 649, holding that the citizenships of each defendant should be specifically alleged.

Respondent moved in the trial court for leave to file her amended complaint correcting this technical defect (R.

128). Leave to file the amended complaint was denied(R. 161). This was one of the errors assigned in the Court of Appeals. Petitioners took the position there that the trial court correctly denied us even leave to file the amended complaint. This Court passed on a similar point in *Bell* v. *Preferred Life Society*, 320 U. S. 238, where it was held (p. 242):

> "A complaint filed in a federal court should not be dismissed for want of jurisdiction because of a mere technical defect such as would make it subject to a special motion to clarify."

We submit the petition sets forth no proper grounds for issuance of the write of certiorari, that the judgment of reversal by the Circuit Court of Appeals is right, and that the petition should be denied.

Respectfully submitted,

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Attorney for Respondent.